85-1194

Supreme Court, U.S.
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No.

in the

Supreme Court

of the

United States

October Term, 1985

STEVEN F. JACKSON, ESQ.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STEVEN F. JACKSON
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Petitioner Pro Se.

QUESTION PRESENTED

I

MAY AN ADJUDICATION OF CRIMINAL CONTEMPT BE SUSTAINED WHERE THE ALLEGED CONTEMNOR'S CONDUCT WAS THE PRODUCT OF UNDISPUTED AND FIRMLY HELD RELIGIOUS BELIEFS, WAS DEVOID OF REQUISITE CRIMINAL INTENT AND WHERE THERE WAS A DENIAL OF AN OPPORTUNITY OF FULL AND FAIR HEARING?

THE PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the Court of Appeals were Steven F. Jackson, Esq. Appellant, and the United States of America, Appellee. Steven F. Jackson, Esq. was the court-appointed lawyer for Howard Jones, one of nine codefendants in a federal criminal case who was held in contempt by the trial judge.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at ___F.2d___(11th Cir.1985). A copy of the opinion appears in the Appendix to this Petition.

JURISDICTION

The decision of the Court of Appeals was rendered on September 17, 1985. This petition has been filed within 60 days of that date pursuant to 28 U.S.C. Sup. Ct. Rule 20. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

AMENDMENT V

No person shall ..be deprived of life, liberty or property, without due process of law....

STATEMENT OF THE CASE

Steven F. Jackson, Petitioner/Appellant, seeks certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed a Summary Order issued by the Honorable Norman C. Roettger of the United States District Court for the Southern District of Florida. The Order and Certificate of Contempt found Appellant in direct criminal contempt of court, holding his conduct to be violative of 18 U.S.C. §401(3)[1] and Fed. R. Crim.

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1. 18 U.S.C. §401 provides: A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -(1)Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, order, rule, decree, or command.

42(a).[2]

On February 27, 1984, a hearing to determine the scheduling of trial in the District Court of a criminal matter, United States of America v. Jonathan Scott Baldwin, Etc., et. al., Case No.: 83-6046-CR-NCR, was held. Petitioner was the attorney for one of the nine codefendants, Howard Avery Jones. Having inquired as to schedule conflicts, the District Court set the trial for the week commencing April 16, 1984.

On April 12, 1984, at the case calendar call, the Court was informed that Petitioner would be unavailable for trial on April 17, 18, 23 and 24 because of his religious requirement to observe the Jewish holiday of Passover. As Petitioner was unable to attend

---

2. Fed. R. Crim. P. 42(a) provides: A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

the calendar call due to another required court appearance out of town, this information was conveyed to the Court by Petitioner's brother and associate. The judge noted the novelty of such a request in his judicial experience, and informed Petitioner's brother that he would be recessing court by sundown, in order that those who wished to observe the holiday would be able to do so.

On April 16, 1984, Petitioner filed a Motion for Stay of Proceedings for the aforementioned dates, predicated upon his free exercise right of religion of the First Amendment, and asserting his client's rights would be impaired by his non-presence. Petitioner advanced to the Court that as "an observant Jew" he was obligated to give adherence to religious law as contained in the Old Testament and the Shulkan Aruch, Code of Jewish Law; that Jewish law was definite in its preclusion against any labor on said days of observance, and that a compulsion of him to

do so would be in derogation of his beliefs and his Constitutional entitlements. The Court denied the Motion to Stay.

Subsequent to the Motion's denial, the Petitioner informed the Court that he would not appear on the days of observance, to which the Court replied:

> ...I can only say,...you are ordered to be here tomorrow subject to contempt if you are not... I certainly will assume that Jehovah will not hold it against you because you are doing matters under penal sanctions of the Court, sir....

On April 17, 1984, the first day of Passover, and the second day of scehduled trial, Petitioner did not appear. The Court opined that Petitioner had committed contempt the preceding day and "ratified, so to speak, by nonattendance, today..." The Court further observed:

...And for the record, I think it was done very deferentially, and no voices were raised at any time, bench or bar, and that it is a distinct difference from all other cases I have read, appeared to be of considerable intensity...

The Court, with a tone of regret, and indicating its lack of firm precedence, further observed:

...The Supreme Court has engaged in enough Tevye-like meanderings; one paragraph goes one way and the other paragraph begins 'on the other hand!' Not very much help for a district judge...

The Court issued its Certificate of Contempt on April 17, 1984, and set a sentencing hearing for April 19, 1984, where Petitioner was afforded the opportunity to respond prior to sentencing. Represented by counsel,

Petitioner contended that the contempt certificate should be vacated because it violated procedural due process, since no opportunity for a hearing, as provided in Fed. R. Crim. P. 42(b),[3] had been availed him; that no criminal contempt was possible due to total absence of scienter or intent.

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3. Fed. R. Crim. P. 42(b) provides: Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The Court, denying testimony of a number of rabbis who came to Court to explain the importance of observing that no labor can be performed on the days of observance, conceded that it had no doubt as to Petitioner's religious practice or devotion. The Court fined Petitioner the sum of $1,000.00; the United States Court of Appeals for the Eleventh Circuit affirmed.

REASONS FOR GRANTING CERTIORARI

I

THE DECISION BELOW PRESENTS AN UNCONSCIONABLE BURDEN ON AN INDIVIDUAL WHO IS FORCED TO CHOOSE BETWEEN THE UNAMBIGUOUS REQUIREMENTS OF HIS RELIGION AS TO THE PROSCRIPTION OF CERTAIN CONDUCT, AND A SECULAR DICTATE TO VIOLATE SUCH RELIGIOUS OBLIGATIONS OR SUFFER PENAL SANCTIONS.

The opinion of the Court below, insofar as it concentrates upon the trial judge's power to hold Petitioner in contempt of court for wilfully defying a "clear and definite court order", avoids almost entirely the underlying nature of that order, and its direct conflict with the constitutional right of Petitioner to observe the dictates of his religion.

The Court of Appeals, like the trial court, fully acknowledged the Petitioner's sincerity as to his religious beliefs, and did not question that indeed the request for a stay of proceedings was made solely for the purpose of following the mandates of obser-

vant Judaism. However, it seems that the failure of Petitioner to give "sufficient notice" to the trial judge for his request for a stay, or in the alternative for a re-scheduled trial date, has been held to be not only a basis for denying Petitioner his First Amendment protections, but a basis for labeling him contemptible and for punishing him for his insistence upon asserting those protections afforded by the Constitution.

Our founding fathers, mindful of the ills of religious persecution which had driven men from their countries of origin to seek a more tolerant place, drafted as the first of our Bill of Rights, an express prohibition upon the newly formed Congress, forbidding the passage of laws which would restrict or impair the free exercise of religious expression.

Since that time, the courts have frequently considered the petitions of litigants who have sought to invoke this Constitutional

safeguard.

For example, when a city charter contained a provision which set municipal elections on the Jewish holiday of Rosh Hashanah, the court held it to be invalid, and ruled that each person is entitled to all constitutional rights, and all at the same time. Detrimental alternatives were deemed no substitute for constitutional rights. Michaelson ex. rel. Lewis v. Booth, 437 F. Supp. 439 (U.S.D.C.-R.I., 1977). Again, in Church of God v. Amarillo Independent School District, 511 F. Supp. 46, affirmed 670 F. Supp. 46 (D.C., Tex., 1981), a school board's refusal to recognize absences for religious holidays was found invalid. In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), Jehovah Witnesses were excused from the practice of saluting the flag in school, since they considered the banner a God- prohibited graven image. Similarly, in N.W.

Indian Protective Association v. Peterson, 565 F. Supp. 586 (U.S.D.C. Cal., N.D., 1983) a plan to construct roads in a national forest, on land considered to holy ground to Indians, was enjoined.

Of couse there have been situations where conflicts between individual liberties and the interests of the majority of the public have been adjudicated in favor of the collective. However, in such instances, the courts have taken great pains to narrow their pronouncements and to caution against going beyond the restrictive language employed in the opinions.

Additionally, the courts have offered, relative to religious expression, that there exists a difference between belief and overt action. "...The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs ...However, certain overt acts can be regulated and where they have...have invariably

posed some substantial threat to public safety, peace or order...", Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) at P. 1793. In Sherbert, supra, the appellant was denied unemployment benefits because she had refused to be available for work on Saturdays (her Sabbath); the Court held the denial invalid.

The Court had previously warned in Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430, that "... only the gravest abuses, endangering paramount interests, give occasion for permissible limitations...." Thomas, supra at 530.

Typical of the admonitions which have been expressed, is the concurring opinion of Justice Douglas in Sherbert v. Verner, op cit., "...For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government...."

This resolution of competing interests

has produced what amounts to Solomonic wisdom applied to the conflict between secular versus religious considerations. The courts have continued to construct guideposts to aid us in negotiating tricky constitutional curves. Thus was created the "compelling state interest" test. Its early espousal can be founds in Harper v. Virginia Board of Education, 383 U,S. 663, 86 S. Ct. 1079, 16 L. Ed. 169 (1966), where the Court suggested that the right to express beliefs may be restricted by the government only when it can be shown that (1) the restrictive regulation or practice serves a compelling governmental interest, and (2) it is the least restrictive means by which that governmental interest can be effectively served. See also, Badoni v. Higginson, 639 F. 2d 172 (C.A. Utah, 1980); Thomas v. Review Board of Indiana. 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981).

In a case involving a sort of reverse

twist, a board of education had granted Amish students the alternative to refuse to attend school beyond the age of sixteen years. The Court, in rejecting such an exclusion, and in disagreement with the Amish position that mandatory attendance would endanger their children's religious convictions, held that the state did not demonstrate a compelling interest for granting this exception to the Amish. Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed.2d 563 (1972).

It is germane to the instant case, to note the treatment applied to this dilemna in Smilow v. United States, 465 F. 2d 802 (C.A., 2d Cir., 1972). The defendant in that case, was summoned before the grand jury to testify, and refused to do so, citing as his reason a religious prohibition against being an "informant." Said defendant argued that Jewish law prohibited him from rendering such secular assistance.

The court held that there was a paramount

state interest in having the grand jury hear "every man's evidence", but nevertheless suggested "...If appellant had refused to appear because he had been summoned on a Jewish Holy Day, the considerations would be different... a postponement for a day or two would provide a feasible and sensible accomodation of individual and societal interests...", supra at 804.

The foregoing are examples of matters involving state agencies or their political subdivisions, and the judicial determinations which have been made relative to state interference with nonsecular concerns. It is clear that judicial officers are subject to the same type of restraints, as evidenced in In Re Adoption of E, 279 A. 2d 785 (1971). In that case, a court had denied an adoption application made by a couple who did not believe in a Supreme Being. In overturning that judicial action, the New Jersey Supreme Court, relying heavily on the decision in

Shelly v. Kraemer, 334 U.S. 1, 68, S. Ct. 836, 92 L. Ed. 1161 (1948), observed that the constitutional prohibition against intrusions by the government in the free exercise of religion apply to judicial officers and the courts, whose actions are no less state actions.

The court, in Menora v. Illinois High School Association, 683 F.2d 1030 (C.A., Ill. 1982) held that a rule which prevented the wearing of headgear (including the yarmulka or skullcap worn by certain observant Jewish men) on the basketball court, was acceptable, in that it served a paramount interest of society, to wit: safety. The court in Menora, noted that each case where there is a need to balance the interests of the state against those of an individual in matters involving the First Amendment, is "sui generis." As such, the courts must examine the peculiar and unique circumstances in each case and to see if the compelling interests of the state warrant interference with individual

rights.

This test must be applied in the instant case, for it has not been before. Without question, the Petitioner herein disobeyed an order given him by a judge. Equally without question the subject order was clear and definite and was understood by the Petitioner. However, Petitioner believed and still believes that said order was violative of his First Amendment rights to observe his religion without governmental interference, unless a showing has been made that satisfies the compelling state interest test. Petitioner believed and still believes that judges must wield their considerable power with caution and restraint, and that if an order is rendered which flies in the face of judicially determined limits of that power, it must be challenged.

In the case at bar it is manifest that there was no compelling state interest which had to take precedence over Petitioner's

right to honor his religious practices. It has always been conceded by Petitioner, that his request for a stay of proceedings was made late in the day, as it were. Petitioner was contrite and apologetic to the trial court for this, and certainly recognized that his request might cause some inconvenience. However, trials, not unlike all things in life, are sometimes affected in their normal progression by unforeseen events which affect human players. At such times, particularly when constitutional rights are involved, a careful balancing test must be applied to determine whether the state's compelling interests are of such a nature as to warrant stripping an individual of those rights.

Thus, we are faced with the question of whether an interim delay in a trial, which perhaps will create some inconvenience, but which was sought so as to allow an attorney an opportunity to observe clear and definite religious obligations, should have been de-

nied, and if so, upon what basis.

It is respectfully suggested that the decisions of this Court in this area do not suggest that mere inconvenience is enough to constitute a compelling state interest. Nor is the fact that the delay sought might create some additional financial expense an interest so compelling as to deny an individual his First Amendment protections. Nor should the fact that the request for the interim delay in the trial was made late operate as some sort of "waiver" of the protections afforded by the constitution.

As stated hereinabove, the Certificate of Contempt, and the decision of the Court of Appeals, concentrate much on the failure of Petitioner to give "sufficient notice" to the trial judge of his request for time off to observe his religious dictates. It is certainly true that had the Petitioner given more notice to the judge it is possible that there would have been an accomodation.

However, can his failure to have given more notice, unfortunate as that may be, force him to lose the protection of the First Amendment as a sort of punishment for an honest mistake where there is no significant overriding interest to be served?

Certainly this was the position of the trial court, which was affirmed by the Eleventh Circuit. When the trial judge expressed to Petitioner that he must come to court on the days of observance, prepared to carry out his duties as attorney, or in the alternative, be held in contempt, the judge in effect gave Petitioner the choice of being in contempt of court, or in contempt of his religion and of G-d! Obviously, the choice was not one lightly made, since the consequences of either would be grave. Yet added to the Petitioner's concerns was the issue of the power of a judge to issue threatening orders ("JUDGE: Well, act at your peril), the adherence to which would violate the

constitution. Petitioner was placed in the peculiar position of being at once an individual, himself before a court pleading for his rights, and at the same time, an attorney and officer of the court who sees a judicial overstepping which if not challenged would be an insult to the constitution and to those who have fought so hard to safeguard its integrity.

Petitioner clearly had no choice but to refuse to abide by the trial court's order mandating his appearance in court on the days of observance. In so doing, he had no intention to be contemptuous, but rather to show respect, not only for his religion but for the constitutional guarantees which all Americans should honor.

It is respectfully submitted that the Eleventh Circuit's concession that if adequate notice had been given by Petitioner a First Amendment question would be presented is some acknowledgment of Petitioner's po-

sition as to the dilemna he faced. However, the Court of Appeals is attempting to write between the lines of the First Amendment, a notice provision, without providing any guidance as to what or how much notice is required under a given set of circumstances to insure the ability to assert one's constitutional protections. Petitioner would argue that there is indeed a First Amendment question presented herein, which has thus far been avoided by the trial court and the Court of Appeals.

II

THE DECISION BELOW AFFIRMING THE IMPOSITION OF CRIMINAL SANCTIONS ABSENT A FULL AND FAIR HEARING CONFLICTS WITH DUE PROCESS DECISIONS OF THIS COURT REQUIRING A MEANINGFUL OPPORTUNITY TO BE HEARD PRIOR TO A FINDING OF CONTEMPT.

The Fifth Amendment to the Constitution of the United States expressly provides that no person shall be subject to the loss of life, liberty or property without due process of law. This is a concept which is so firmly rooted in tradition and law, that it is rarely limited, much less abandoned.

The act of holding an attorney in contempt of court is certainly a serious matter, which can have grave consequences in addition to the obvious one occasioned by the punishment for the contempt itself. As such, due process must be fully complied with in order to assure a just result. Recognizing the seriousness of a charge of contempt of court, Justice Black, speaking for the Court on

this issue in In Re Oliver, 333 U.S. 257, 275-276, 68 S. Ct. 499, 508, 92 L. Ed. 682 (1948) opined

> Except for a narrowly limited category of contempts, due process of law...requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation....

In Ciraolo v. Madigan, 443 F. 2d 314 (9th Cir. 1971), an attorney had filed an affidavit of prejudice against the District Court and was adjudged in contempt. Asserting that his due process protections had been abrogated, he appealed. The court, delineated those narrow exceptions to notice and hearing requirements of due process stating

> The narrow exception to those due process requirements includes only charges of misconduct in open court, in the presence of the judge, which disturbs the court's business, where all the essential elements of the misconduct are under the eye of the court, or actually observed by the court, and

> where immediate punishment is essential to prevent demoralization of the court's authority before the public....

Since obviously different circumstances call for different remedies, Fed. R. Crim. P. 42 is broken down into subsections (a) and (b) to allow one method to deal with one type of contempt, and another to deal with most contempts.

Conceptual guidelines for the limited use of the summary contempt provisions in subsection (a) are found in Harris v. United States, 382 U.S. 162 (1965)

> Rule 42(a) was reserved for exceptional circumstances...such as acts threatening the judge or disrupting a court hearing...summary contempt is for misbehavior...in the actual presence of the court....

This Court has stated that response to conduct which may be improper should be dealt with summarily only when there is "compelling reason for an immediate reply." United States v. Wilson, 421 U.S. 309 (1975).

Clearly the key is that while there must be a summary method available to judges to control their courtrooms where there is an actual disturbance in progress, or other situation which poses a real and immediate threat, this method should not be employed except under very limited circumstances.

It is suggested that the circumstances in the instant case were not sufficient to warrant the "emergency" provisions of 42(a), and since this was the option elected, Petitioner was thereby denied due process.

The Court of Appeals in affirming the use of 42(a) seems to be most concerned with the fact that the trial court "had his authority undermined" by Petitioner's action. However, it should be clear from the record that no intent to be disrespectful, or to create a scene or otherwise disrupt the proceedings was shown. In fact, the trial court volunteered that the Petitioner was most respectful to the Court, and noted how unu-

sual this particular dispute was.

In short, there was no need and no benefit to be realized by holding the Petitioner in summary contempt, rather than proceeding under 42(b) thereby affording Petitioner a full opportunity to be heard and to present all relevent evidence on his behalf.

The Court of Appeals also dismisses the trial court's failure to permit the testimony of the rabbis as irrelevant, since the trial court conceded Petitioner's sincerity. However, the failure of the judge to permit this testimony, clearly prejudiced the Petitioner's First Amendment arguments, in that said testimony would have crystalized the conflict which existed for Petitioner.

Petitioner would respectfully urge that his rights to due process were violated by the trial court's employment of 42(a) under circumstances which clearly did not mandate its usage and that such denial directly conflicts with prior holdings of this Court.

III

THE DECISION BELOW IS VIOLATIVE OF THE DUE PROCESS CLAUSE IN THAT THERE WAS NO EVIDENCE OF ANY CRIMINAL INTENT NOR DID THE COURT FIND ANY CRIMINAL INTENT ON THE PART OF PETITIONER.

The Court of Appeals, in affirming the trial court's Certificate of Contempt, summarily dismisses all of the arguments advanced as to the need for intent, and states that since the Petitioner knew he had been given a direct order, which he understood, and thereafter wilfully disobeyed said order, he was therefore guilty of contemptuous behavior. Clearly, this simplistic analysis, taken to its logical conclusion, would require a person to obey any order of a court, under any circumstances no matter how unreasonable, or face penal or financial sanctions. This theory would create absolutely unbridled authority in a judge to order an attorney to do that which he may not be empowered to order him to do, and he thus

would know that his failure to comply automatically will land him the label of criminal.

Obviously, there must be some other basis for defining a contemptuous act besides the mere refusal to obey a judge's order. It is axiomatic that criminal contempt requires not only a contemptuous act but a wrongful state of mind. See Cykes v. United States, 444 F. 2d 928,930 (1971).

Finally, the inability to comply with a court order is a complete defense to a criminal contempt citation. United States v. Rylander, 714 F. 2d 996 (9th Cir. 1983); United States v. Joyce, 498 F.2d 592 (7th Cir. 1974). If this Court accepts, as the trial court did, that Petitioner was totally sincere in his beliefs, and did in fact wish to observe his faith according to its dictates, then also it must be accepted that no wrongful state of mind could possibly have existed, and likewise, Petitioner really

could not have complied with an order of a court which would force him to turn his back on devoutly held religious beliefs.

It is suggested in all sincerity, that the trial judge had options available to him to "punish" the Petitioner for his failure to notify the court earlier of his special need. In the case at bar, Petitioner was a court-appointed attorney for one of the defendants. The trial judge could have used his authority to prevent the Petitioner from receiving similar appointments for a time. Similarly, the trial judge could have recommended that some form of professional discipline be considered for Petitioner for not timely notifying the court of his need for an interim delay.

However, rather than, seek a resolution which would have allowed Petitioner the rights which are his under the constitution and at the same time send out a warning that carelessness must be in some way punished,

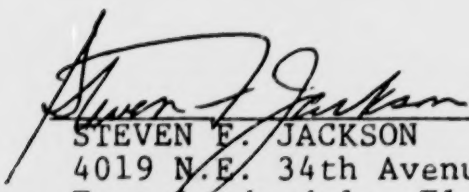
the trial court forced the Petitioner into choosing between two responsibilities which in this instance, could not be reconciled.

No evidence has been proferred which in any way tends to show any bad motive or malice on the part of Petitioner. In fact the opposite has been admitted by all. As such, an essential element of the "crime" has not been proven, and accordingly due process has been violated.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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Appendix

MATTER OF JACKSON

Cite as 592 F. Supp. 149 (1985)

In re the Matter of Steven JACKSON, Esq.

This contempt proceeding arose in the following case: United States of America v. Jonathan Scott Baldwin, et al.

No. 83-6046-Cr.

United States District Court,

S.D. Florida,

Fort Lauderdale Division

April 17, 1984

Supplemental Order Aug. 13, 1984.

In contempt proceeding, the District Court, Roettger, J., held that: (1) attorney's defiance of court's order denying his motion for stay of proceedings so that he could have four days off for Passover constituted contempt; (2) contempt which was committed in actual presence of court required summary disposition; (3) attorney who had been removed from representing his client after being found in contempt could not recover fees under Criminal Justice

Act for "in court" representation time; and (4) attorney could recover fees for calendar calls and first day of trial.

Order Accordingly.

1. Contempt 20

Attorney's defiance of court's order denying his motion for stay of proceedings so that he could take four days off for Passover constituted contempt, in view of attorney's failure to advise court in ample time of his scheduled conflicts, especially after having assured court when trial date was selected that he had none. 18 U.S.C.A. 401(3).

2. Contempt 52

Attorney's contempt which occurred when he defied court's order denying his motion for stay of proceedings was committed in actual presence of court and therefore required summary disposition. Fed. Rules Cr.Proc. Rule 42(a), 18 U.S.C.A. 18 U.S.C.A. 401(3).

3. Contempt 20

Fact that attorneys defiance of court's order denying his motion for stay of proceed-

ings was in an otherwise respectful manner did not make it less of a contempt. Fed Rules Cr. Proc. Rule 42(a), 18 U.S.C.A.; 18 U.S.C.A. 401(3).

4. Contempt 52

Face-to-face refusal to comply with Court's order itself constitutes an affront to court, and when that kind of refusal disrupts and frustrates an ongoing proceeding; summary contempt must be available.

SUPPLEMENTAL ORDER

5. Attorney and Client 152

Attorney who had been removed from representing his client after being found in contempt for failing to appear and represent his client's interests could not recover fees under the Criminal Justice Ace for "in court" representation at sentence hearing, where client had not been sentenced, and might well never be, because jury was unable to arrive at a verdict as to him, and where only sentence hearing at which attorney had ever appeared was his own. 18 U.S.C.A. 3006(A).

6. Attorney and Client 132

Attorney who had been removed from representating his clients interests could not recover fees under the Criminal Justice Act for his "preparation time" on a quantum meruit basis, since successor attorney had to review file and prepare himself for trial on a crash basis in evenings and on weekends and since taxpayers should not be required to reimburse both lawyers for their time spent in preparing for trial. 18 U.S.C.A.; 3006(a).

7. Attorney and Client 132

Attorney who had been removed from representating his client at start of lengthy criminal trial after being found in contempt for failing to appear and represent his client's interests could nevertheless recover fees under the Criminal Justice Act for time claimed for calendar calls and for first day of trial. 18 U.S.C.A. 3006(a).

Stanley Marcus, U.S. Atty., Stephen LeClair, Asst. U.S. Atty., Miami, Fla., for plaintiff.

Bruce Rogow, Fort Lauderdale, Fla., for defendants.

CERTIFICATE OF CONTEMPT

ROETTGER, District Judge.

1. This case involves 9 defendants being tried on a 35-count indictment. The best estimate of trial time is at least three and probably four weeks. A jury panel of 55 jurors was assembled for jury selection inasmuch as the Court had given extra peremptory challenges to the defendants because of their number.

2. The case was set for trial after a calendar call with the lawyers present on Monday, February 27, 1984, seven full weeks prior to the commencement of the trial. At that calendar call on February 27th, the trial date selected was April 16th.

3. The significant portions of the reporter's notes at that calendar call which pertain to the scheduling of the trial in connection with the attendance of Steve Jackson, Esq., attorney for Howard Avery

Jones, is set forth hereafter:

JUDGE: Anybody have a problem with trying the case in April or May?* *

Have you got any pre-planned or prepaid vacations?* * * *

If a lawyer does, you better speak now or you are going to have to explain it to your wife.

If you have a preplanned or prepaid deposit or something, let me know because I don't want to interfere with your vacation.* * *

JACKSON: I Don't have any vacation planned, but I do have a trial in New York on the 1st week of April. After that, I have no objections to any of the time in those 2 months. * * *

JUDGE: 16th of April, we will begin this case at 9:30 on Monday.

4. No written motion for continuance, motion for stay, or suggestion of difficulty of Mr. Jackson with the Court's announced scheduling of this trial was presented to the Court

until the morning of the trial on April 19th.

5. On the Thursday before the Monday trial date, April 12, 1984, Attorney Jackson's brother attended calendar call for him and orally advised the Court his brother was ready for trial but wanted four days off for Passover. The Court was startled and advised he'd never had such a request from a lawyer or juror, but always recessed early enough specifically to accommodate the ones celebrating Passover or Holy Days.

6. About 9:40 on Monday April 16th, 1984, the trial was called and all of defendants' counsel, including the local counsel for four out-of-state attorneys were present as well as the Assistant U.S. Attorney and government agent. The trial had to be started a few minutes late because the marshals had been transporting two defendants who were in custody.

7. Attorney Alvin Entin, co-counsel for defendant Baldwin, requested a recess at 4 o'clock so that he could get to a dinner and celebrate Passover with hsi family. The Court granted Mr. Entin's request with an observation

that it was always the Court's practice to recess a little early so that jurors desiring to do so could attend the dinner and services in connection with Passover.

8. A Flurry of last-minute motions were presented by various counsel.

9. When Mr. Jackson presented his motion; the Court was advised in writing and with specificity that Mr. Jackson was seeking a stay of proceedings, not simply to leave early to celebrate the beginning of Passover but was seeking a stay of this trial on Tuesday and Wednesday, April 17th and 18th, as well as Monday and Tuesday of the scheduled 2nd week of the trial, April 23rd and 24th, for the entire days.

10. Steven Jackson, Esq., described this as a practice he always faithfully observed and requested the stay on that basis. The Court does not doubt his reputation, but is curious as to why he was unaware of the date of Passover until this late date.

11. At the close of considerable colloquy

between Court and counsel about the matter, the Court, having noted the fact that a request for so much time off for Passover had never been presented to the Court during his nearly 12 years on the Bench, adn that the Court does not close for any portion of Good Friday, either on the date set by the Eastern rites or the one observed by Roman Catholics and Protestants (in 1984, as apparently occurs every four years, the dates are the same). The Court also observed it does not close for Ramadan or any of the holy days of the Islam faith, but has always attempted to keep the calendar clear on Yom Kippur for attorneys or jurors who happen to members of the Jewish faith.

12. The undersigned judge is a member of the Presbyterian Church and attends Good Friday service during his lunch hour.

13. The Court denied the motion for stay because of the late filing of the motion in a nine defendant, four-week trial, espe--

cially with this Court's and district's heavy trial calendar.

14. Attorney Jackson remained at the lectern and announced that: "I judt want to inform the Court that, with due deference to your ruling, I'll not be here tomorrow and Wednesday, or Monday and Tuesday of next week. Thank you." The Court responded: "With due deference to you, sir, I will consider whether or not to send a marshal to bring you."

15. The Court pursued various attempts to provide an alternative for Attorney Jackson while achieving adequate representation of his client. After the lunch r ecess, when the matter was reconvened at 12:40, the Court inquired of defendant Jones if he would be willing to have another attorney represent his interest during the period that Mr. Jackson wished to be gone.
He replied that he would but the Court urged him to discuss the matter with his lawyer.

After Attorney Jackson conferred with defendant Jones, Attorney Jackson announced that it would not be satisfactory to have someone else cover for him to represent defendant Jones durin this period.

16. Around 4 o'clock the Court recessed so that the lawyers or jurors who wished to do so could attend to the preparations for the beginning of Passover. At that time the Court inquired to Mr. Jones if he had been able to make any progress in this matter and he advised that he had not but that perhaps he could by morning. Attorney Jackson again advised the Court as follows:

JUDGE: I most assuredly will consider your action in direct defiance of a court order if you are not . . .

JACKSON: With all due respect, I answer to a higher authority than this Court in this matter and I will not be here tomorrow.

JUDGE: Well, you act at your peril.

The Court then recessed the trial for the day.

17. At 9:30 o'clock on the next day, Tuesday, April 17th, trial was to resume with a continuation of the jury selection process but Attorney Jackson was absent, in continuing defiance of the Court's order.

18. On Tuesday morning Mr. Jones wished to address the Court and appeared very wan and a bit frightened. He wanted to proceed with the trial and have a lawyer, and his exact statements were as follows: "Your Honor, I am embarassed about what happened yesterday. My attorney, Mr. Jackson, did not confer with me on the motion he made about this holy day. I had no idea what he was doing. I am real anxious to get this over with and go on with my trial. I don't know too much about the law, but I realize my life is at stake and I am worried and I am scared. . . . I don't have any money and can't afford to get another one (attorney) and at this late hour most don't want to get involved. I need another attorney. I am willing to do whatever the

Court suggests, I am in your hands. Your Honor."

19. The court, with the invaluable help of U.S. Magistrate Kyle, obtained the services of a local lawyer, Jeffray Miller, Esq., who agreed to step in and help out. The Court notes that all other counsel were extremely helpful in assisting the Court with the situation.

20. The Court further notes that the speaking tones employed by Mr. Jackson and the Court were conversational tones and voices were not raised throughout the various colloquies or rulings.

21. The Court further certifies that I saw or heard the conduct of Steven Jackson, Esq., constituting the contempt and that it was committed in the actual presence of the Court.

CONCLUSIONS OF LAW AND JUDGMENT OF CONTEMPT

(1,2) 1. Based on the foregoing facts, the Court concludes that the actions by Attorney Steven Jackson were disobedience by an attorney, an officer of the court, to the lawful orders of the Court commanding his presence to continue

the jury selection on the morning of April 17th, and such actions constitute a violation of 18 U.S.C. 401(3). The contempt was committed in the actual presence of the Court and requires summary disposition under Rule 42(a) of the Federal Rules of Criminal Procedure. The contempt occurred twice on the day of April 16th when Attorney Jackson announced in open court that he was not complying with the order of the Court and would not be present on the four days for which he had unsuccessfully sought a stay only a few minutes earlier. This contempt continued on the morning of April 17th when he failed to appear at the required time of 9:30 or at any time throughout the morning until the Corut finally recessed at 1:05 p.m. after completing the jury selection process. To hold that the contempt of April 17th was not committed in the presence of the Court after the announced defiance on April 16ht would simply be some form of judicial sophistry or shadow-boxing under these particular circumstances.

(3) 2. Even the failure of an immunized witness to testify is an intentional obstruction of court proceedings when the witness refuses to answer the questions put to the witness. Unites States v. Wilson, 421 U.S. 309, 95 S.Ct. 1802, 1805, 44 L.Ed.2d 186 et seq. (1975). The fact that attorney Jackson's defiance was in an otherwise respectful mannder does not make it less of a contempt See 95 S.Ct. at 1806.

(4) As indicated by the Court, "the face-to-face refusal to comply with the Court's order itself constitutes an affront to the Court, and when that kind of refusal disrupts and frustrates an on-going proceeding as it did here, summary contempt must be available. . . . " I bid.

3. Most of the morning of April 17th was consumed by trying to accommodate defendant Howard Jones' understandable desire to be represented by counsel and get on with his trial. That desire to proceed was joined in by other defendants and counsel. Eleven of the fifteen peremptory challenges had already been exhausted by defen-

dants. So the jury selection procedure was well along towards completion. Only because of the unselfish willingness of Attorney Jeffray Miller to step in on April 17 and represent defendant Jones, was a further disruption in the proceedings prevented; because of his prompt appearance, the Court was able to resume jury selection at approsimately 11:40 a.m. This also precluded the necessity to recess for another day which would have resulted in a huge expense in calling in the jury panel again, a matter that could well have been assessed against Attorney Jackson for contempt. (However, that, fortunately, is a matter not before the Court.)

4. The undersigned judge regularly attends the church of his choice (Presbyterian) on a weekly basis and applauds the consientious adherence of Steven Jackson to the observance of his religious faith as he feels is necessary. However, though the Court may sympathize with Mr. Jackson's wishes, it no more excuses his defiance of the Court's order and his shirking of his

duties as a lawyer, particularly in view of the tardiness of his motion for stay, than would any other desired form of expression.

U.S. v. Lespier, 558 F.2d 624 (1st Cir. 1977), is not present some very similar factual matters. The case involves a plenary appeal from the underlying conviction but the opinion of the Court of Appeals points out at p. 626, that an attorney for a defendant filed a motion for continuance of the longstanding trial date only three working days prior to the trial, reciting that the lawyer would be attending a political meeting thereby making it physically impossible for him to appear on the date set for trial. The trial judge denied the motion, noting that at no time had the lawyer given the court information about the conflict in the schedule, and jury selection commenced. In Lespier, the jury was selected and empanelled, and after the court again denied the lawyer's motion for a continuance, the lawyer virtually abandoned his client by making no opening statement, engaged in no cross-examination, presented no witnesses, made no argument

to the jury, and apparently participated very little in the charge conference. The verdicts of guilty were returned in less than two hours. The court of Appeals described the conduct of this lawyer in terms that certainly apply to Mr. Jackson in this case, as follows:

> "The conduct of (the attorney) was no less eigher (1) the unrealistic if not contempuous expectancy that the court, despite elaborate advance scheduling of a trial, would at the last moment subordinate the interest of all others to the personal plans of a lawyer who had not taken the smallest step of giving notice earlier, or (2) the willingness to abandon his client, forcing him to retain trial counsel at the 11th hour when a serious trial and a real possibility of lengthy imprisonment impended." Id. at 627

The court continued, stating that:

> "a standard of values which places an attorney's private political activity above his responsibilities to the court and to his own clients, even if the approve (whic Mr. Jones

did not) is fundamentally incompatible with the premises underlying the adversary system." Id. at 628

The court pointed out that this type of conduct would have been clearly punishable as criminal contempt under 18 U.S.C. 401(3). The court subsequently pointed out that if the lawyer believed that the trial court had abused its discretion in denying a continuance, that the proper course would have been to preserve an objection for appeal. The court reversed and remanded for a new trial because the attorney's representation fell below any standard of competent representation.

Mr. Jackson's desire to follow his religious practices does not entitie him to abandon his client or to disrupt the orderly judicial proceedings of this lengthy trial. It is therefore the judgment of this Court that he is in contempt for each of these direct disobediences and that a hearing will be held on Thursday, April 18th, 1984, at 9:30 a.m. in the U.S.

District Courthouse, Fort Lauderdale, Florida, in order that Steven Jackson, Esq., may appear to explain any exculpatory, mitigating or extenuating reasons as to his contempt exhibited in this case and to have an opportunity to confer with counsel of his choosing.

5. Despite what Attorney Jackson thinks about this matter, it is not a case involving Mr. Jackson's exercising of his religious practices. It is a case of an officer of the court who failed to advise the Court in ample time of his scheduled conflicts, especially after having assured the Court when the trial date was selected that he had none in April or May. His defiance of the Court's order denying his motion for stay constitutes the contempt.

SUPPLEMENTAL ORDER

This matter came on before the Court on a petition of Steven Jackson, a lawyer who was removed from representing his client at the start of a lenghty criminal trial, after the Court found the lawyer in contempt for failing to appear and represent his client's interest;

additionally, removal occurred after the request of defendant that he receive a new lawyer. Jackson's petition seeks attorneys' fees of $1930.00 and expenses of $117.92 under the provisions of the Criminal Justice Act.

Because of the unusual situation presented here, the Court will enter a separate order on this petition rather than simply indicating the amount approved, if any, in the blank provided on the CJA form.

1. The Court's research reveals no cases in which a lawyer has been removed for contempt and has thereafter filed a petition for reimbursement under the Criminal Justice Act.

2. The Court's research reveals no cases where the defendant has requested a new attorney and the former attorney then petitioned for award of attorneys' fees under the Criminal Justice Act, although it may happen occasionally.

3. The purpose of the Criminal Justice Act is to protect the indigent defendant and afford him as nearly equal footing as possible to other

nonomdogent defendants. 18 U.S.C. 3006(A).

4. The amount claimed by Jackson is nearly twice the limitation under the guidelines established by the reviewing courts of appeal for fees under the Criminal Justice Act.

(5) With the circumstances of the contempt in mind, we turn to the specifics of Attorney Jackson's petition for reimbursement. The first item claimed under the section for "in court" representation was a sentence hearing. Mr. Jones has not been sentenced --and may well never be--- because the jury was unable to arrive at a verdict as to defendant Jones. The only sentence hearing at which Attorney Jackson has ever appeared in this Court's view to permit funds from the Treasury to be used to reimburse Attorney Jackson for attending his own sentencing.

This Court has approved the petition for attorneys' fees filed by the lawyer who ably stepped in during the voir dire portion of the trial and managed to achieve a "hung jury" on the several counts as to his client (all the

other defendants, except one who was only charged with one count, were found guilty.)

(6) At first this Court considered the possibility of awarding fees to Mr. Jackson for his "preparation time" on a quantum meriut basis. However, the successor attorney had to review the file and prepare himself for trial on a crash basis in the evenings and on weekends. Should the taxpayers be required to reimburse both lawyers for their time spent in preparing for the trial, especially when Mr. Jackson abandoned his client during trial and was held in contempt? This court thinks not.

The Court is mindful that there could be situations where the first attorney and a successor attorney would both be entitled to reimbursement for the time spent in preparing for trial; for example, if a successor attorney had to be appointed because of illness or injury to the first appointed attorney. However, in circumstances such as the instant case, in which the first attorney participated in the selection of the

trial date and affirmatively assured the Court in February that he had no problems with a trial date in April or May other than the first week in April, did not file a written motion thereafter until the morning of trial despite his client or any of the other counsel, and only advised the Court two working days earlier by an oral request made by his brother of his intentions to seek a four-day stay of the trial, especially when it seems most unusual that someone claiming to be that religious would not have been aware of the date of Passover at an earlier date, then the taxpayers should not have to pay two lawyers for the time of preparation to represent one defendant in a trial.

(7) That brings us to the time claimed for calendar calls and for the first day of the trial (even though a portion was spent, albeit in vain, trying to fashion an alternative acceptable to Mr. Jackson and his client which would permit the trial to continue without interruption.) This time totals 8 hours and at the statutory rate

of 4.30 per hour equals $240, with the costs expended of $117.22, the amount awarded is $357.22.

UNITED STATES v. BALDWIN

UNITED STATES of America,

Plaintiff-Appellee,

v.

Jonathan Scott BALDWIN, et al., Defendants.

In re Steven JACKSON,

Esquire, Appellant.

No. 84-5296.

United States Court of Appeals,

Eleventh Circuit.

Sept. 17, 1985.

The United States District Court for the Southern District of Florida, Norman C. Roettger, J., 592 F.Supp. 149, held attorney in criminal contempt for stating that he would not follow court order and failing to appear to represent client as ordered by court, and attorney appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) summary contempt proceedings were appropriate, since attorney had informed trial

court in advance for his reason for not appearing; (2) attorney's statements that he would not follow court's order directing him to appear were contemptuous acts; (3) attorney was not entitled to hearing to establish his religious beliefs, inasmuch as contempt finding was based on his failure to give adequate notice of his absence; and (4) attorney's refusal to appear was "willful."

Affirmed.

1. Contempt 52

Contemptuous actions need not be delivered in rude manner to summarily hold actor in direct criminal contempt. Fed. Rules Cr. Proc. Rule 42(a), 18 U. S. C. A.

2. Contempt 51

Attorney's conduct in refusing to appear for criminal trial on religious holiday was serious enough to be subject to summary, rather than non-summary, contempt proceeding, where disruption caused by attorney's conduct was severe and attorney had specifically told trial judge why he would not be present. Fed. Rules Cr. Rykes Cr. Proc. Rule 42(a), 18 U. S. C. A.

3. Contempt 51

Mere failure to appear at trial, without prior explanation, should not be subject to summary contempt proceedings, since absence alone is not contempt, and reasons for default are important. Fed. Rules Cr. Proc. Rule 42(1,b), 18 U. S. C. A.

4. Contempt 20, 52

Attorney's direct statements that he would not follow trial court's order to appear and represent his client on religious holiday were contemptuous acts, which authorized court to summarily hold attorney in criminal contempt on day after statements. Fed. Rules Cr. Proc. Rule 42(a), 18 US. C. A.

5. Contempt 61(1)

Attorney who refused to appear and represent his client on religious holiday was not entitled to hearing prior to contempt finding to provide him with opportunity to show religious importance of his absence, where trial court accepted attorney's sincerity in following his religion, but rendered contempt finding based upon attorney's unwarranted failure to give court adequate notice

of his inability to appear.

6. Contempt 20

For purposes of criminal contempt, requiring "willful" disregard or disobedience of public authority, "willfulness" means deliverate or intended violation, as distinguished from accidental, inadvertent, or negligent violation.

See publication Words and Phrases for other judicial constructions and definitions.

7. Contempt 20

Fact that attorney based his refusal to appear at criminal trial on religious reasons, did not negate element "willfulness" for purposes of criminal contempt finding against attorney; trial court had twice warned attorney that he was reuuired to appear and that he would be subject to contempt if he failed to do so.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and THOMAS*, District Judge, sitting by designation.

KRAVITCH, Circuit Judge:

Appellant, Steven F. Jackson, an attorney, appeals a judgment of criminal contempt, 18 U.S.C. & 401(3)[1] imposed upon him pursuant to Federal Rule of Criminal Procedure 42(a), for stating that he would not follow a court order, and then failing to appear to represent his client as ordered by the court. 592 F.Supp. 149 (D.C.Fla. 1984). Finding that the court below properly found appellant in criminal contempt, we affirm.

I. BACKGROUND

Appellant was the lawyer for Howard Jones, one of nine codefendants in a federal criminal case. On February 27, 1984, the district court held a calendar call in order to set the trial date. The parties estimated that the trial would last three to four weeks. At that time, the court inquired as to the dates in April or May when the lawyers for the various defendants would be unavailable. Jackson responded: "I don't have any

*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

vacation planned, but I do have a trial in New York, first week of April. After that, I have no objections to any of the time in those two months." The judge set the trial to begin on Monday, April 1984.

On April 12, 1984, the Thursday preceding the Monday on which the trial was to begin, Jackson's brother, Jeffrey Jackson, attended a pretrial hearing in his brother's place. Jeffrey Jackson orally advised the district court that Steven Jackson was ready for trial, but that he would not be available for trial Tuesday and Wednesday of the next week and Monday and Tuesday of the following week because he would be observing Passover, a Jewish holiday. The judge responded that he had never before received such a request, but that he always recessed court by sundown so that everyone could be home in time for Passover. Jeffray Jackson said that he would

1. 18 U.S.C. & 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

so advise his brother.

On the following Monday, the day the trial was scheduled to begin, Jackson filed a written motion to stay all proceedings on that Tuesday and Wednesday and the following Monday and Tuesday. This motion was based on the free exercise clause of the first amendment. Jackson told the court that he was an observant Jew, that these days were the first and last two days of Passover which were equal in station to the highest of the Jewish holy days, and that it had been his practice since childhood to follow Jewish law that no work be done on those days. Jackson further states that if the trial proceeded in his absence his client would be unduly prejudiced. The court denied Jackson's motion, but stated that the court would adjourn early for Passover. The court explained that with a nine-defendant, three to four week trial, the case could not be rescheduled at that point in time.[2] In response Jackson stated:

> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"I just want to inform the court that with due deference to your ruling, I will not be here tomorrow and Wednesday or Monday and Tuesday of next week." The court warned Jackson that it would consider whether to send a marshal to bring him.

Following the lunch recess that day, the court asked Jackson's client, Jones, whether he would object to one of the other lawyers filling in on the days that Jackson was absent. Jones states that he had no objection, However, after Jones conferred with Jackson, Jackson informed the court that he could not adequately represent Jones unless he was present throughout the proceedings, and that Jones would object to another

(2) Misbehavior of any of its officers in their official tranactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

2. The judge further told Jackson t hat he did not adjourn court for his own religious holidays and that he was not insensitive to Jackson's faith or the requirements of it.

lawyer filling in. The court then suggested that Jackson could get a transcript of the missed testimony. Jackson declined this offer. The other defendant's lawyers explored the possibility of one of them representing Jackson. Again, Jackson found this alternative unacceptable. The court also offered to recess at four p.m. or anytime during the day that Jackson had to attend religious services. Jackson maintained that he could not work at all during these days.[3] The court specifically ordered Jackson to be at court the following day or he would be subject to contempt and criminal sanctions.

3 Apparently, the judge contacted a Jewish lawyer and a Jewish judge to investigate the veracity of Jackson's religious claim. Although we do not condone this type of ex parte investigation, the inquiry proved harmless as the court's ruling was premised upon the judge's acceptance of the existance and sincereity of Jackson's claimed religious need to refrain from work on the days in question.

At around four o'clock that afternoon, after the jury had been partially selected, the court recessed so that any lawyers or jurors who wished to do so could return home for Passover. The court again told Jackson that it would not grant a stay given the size and expense of the trial. The court urged Jackson to appear and stated that it would consider a failure to attend in direct defiance of a court order. Jackson again advised the court that he would not attend the trial the next day.

JACKSON: With all due respect, Your Honor, I answer to a higher authority than this court in this matter and I will not be here tomorrow.

JUDGE: Well, act at your peril.

The next morning, the trial resumed and the jury selection continued. Jackson did not appear. The court found that Jackson had committed contempt twice on April 16 when he stated on two occasions that he would not obey the court's order to appear. The court stated it would issue a certificate of contempt as soon as it was typed

and would then give Jackson an opportunity to be heard. Next, the court addressed the problem of Jones' representation. After some delay, the court issued a certificate of contempt finding that Jackson had committed contempt twice on April 16 and that contempt had continued on April 17. The certificate stated that the court did not doubt Jackson's representation of his religious practices and concluded:

> Despite what attorney Jackson thinks about this matter, it is not a case involving Mr. Jackson's exercising of his religious practices. It is a case of an officer of the court advising in ample time of his scheduled conflicts, especially after having assured the court when the trial date was selected that he had none in April or May. His defiance of the court's order denying his motion for stay constitutes contempt.

The order also set a hearing on the matter for April 19.

Jackson appeared on April 19, represented by counsel. The judge stated that he had filed

the certificate of contempt, but would afford Jackson the opportunity to explain his conduct at that time. Jackson's counsel argued that the court should vacate its certificate of contempt because the court had not afforded Jackson an opportunity to be heard prior to finding him in contempt as required by Federal Rule of Criminal Procedure 42(b), and because Jackson lacked the requisite criminal intent. In addition, Jackson's lawyer proffered evidence on the importance of the first and last two days of Passover, but was not permitted to introduce the testimony of two rabbis on this issue. The court found that such evidence was not relevant, as the court did not question Jackson's religious practice or his devotion to his religion.

Jackson testified next. He admitted that Passover occurred in March or April of each year. He further admitted that "perhaps" he had been "tarry of informing the court" that he could not be present during Passover, but stated that he had never before had a request for a continuance due to a religious holiday denied. The court stated that had Jackson filed the motion when he

should have, it would have been easy to rearrange the court's calendar, but that his failure to do so fell pitifully short of his responsibility as a lwyer. The court fined Jackson $1,000.

II. SUMMARY CONTEMPT

The court chose to punish Jackson's actions summarily, pursuant to Federal Rule of Criminal Procedure 42(a)[4] rather than under Federal Rule of Criminal Procedure 42(b).[5] We recently described the difference between summary and non-summary contempt in Matter of Heathcock, 696 F.2d 1362 (11thCir. 1983):

4. Fed.R.Crim.P. 42(a) provides:

Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered in the record.

5. Fed.R.Crim.P. 42(b) provides:

Disposition Upon Notice and Hearing: A cri-

(footnotes continued):

minal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury or in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except

Historically, there are two types of criminal contempt: direct and indirect. Direct contempt is committed in the "actual presence of teh court." See Nye v. United States, 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1941); United States v. Marshall, 451 F.2d 372 (9th Cir. 1971). "Indirect contempt is contumacious behavior occuring beyond the eye or hearing of the court and for knowledge of which the court must depend upon the testimony of third parties or the confession of the contempnor." United States v. Marshall, 451 F.2d at 373. Both contempt classifications under Fed. R, Crim. P. 42(a) and (b) requires notice and hearing. United States v. Willett, 432 F.2d 202, 204 (4th Cir. 1970) 8B Moore's Federal Practice. 42.04(1) (2ded 1981).

(footnote 5. cont'd)

with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Id. at 1365 (footnote ommitted). "The power to summarily hold an individual in direct criminal contempt operates to vindicate the authority of the court and stands as a bulwark against disorder and disruption in the courtroom." Sandstrom v. Butterworth, 738 F. 2d 1200, 1208-09 (11th Cir. 1984), cert. denied, ---U.S.---, 105 S. Ct. 787, 83 L.Ed2d 781 (1985) (footnote ommitted). There are two justifications for summary contempt: "First, because in a direct contempt the judge has observed the contemptuous act, there is 'no need of evidence or assistance of counsel before punishment.' Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed 767 (1925).

Second, the maintenance of courtroom decorum sometimes necessitates quick and forceful action. Id." Id. (footnote ommitted). Because summary contempt allows the court to punish the contemnor without benefit of numerous procedural protections, we have determined that it is only appropriate in narrowly defined circumstances. Matter

of Heathcock, 696 F.2d at 1365; Unites States v. Brannon, 546 F.2d 1242, 1248 (5th Cir. 1977).[6]

(Appellant argues that summary contempt was inappropriate in this case for numerous reasons. First, appellant claims that Rule 42(a) is "limited to those severe circumstances . . . where someone is so disruptive to the court in the middle of the trial that the court must invoke extraordinary authority to keep the proceedings moving." Jackson claims that his conduct did not ruse to this level. This argument need not detai us for long. In United States v. Wilson, 421 U.S. 309, 95 S.Ct. 1802, 44 L.Ed2d 186 (1975), a case concerning two witnesses who refused to answer questions during the course of a criminal trial, the Supreme Court announced that the contemptuous

6. The Eleventh Circuit, in the en banc decisio Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

actions need not be delivered in a rude manner in order to fall with Rule 42(a). The court stated:

> Respondents' refusal to answer, although not delivered disrespectfully, plainly fall within the express alnguage of Rule 42(a), and constitute contemptuous conduct. Rule 42(a) was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial. All that is necessary is that he "saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

Id. at 314-15, 95 S.Ct. at 1805-06.

(2) Appellant's next argument, that the disturbance caused by his absence was minor, and thus unworthy of summary contempt, it also unpersuasive.[7] The disruption caused by Jackson's conduct was severe. During the first two days of trial, the court spent a significant amount

of time dealing with Jackson's refusal to attend the trial and represent his client.[8] The members of the jury venire, the lawyers for the other defendants, and the defendants, especially Jackson's client,[9] were greatly inconvenienced

7. At oral argument before this court, appellant had changed his position somewhat and his counsel stated that Jackson's actions had caused a "gross inconvenience."

8. On April 16, the court was consumed with trying to work out an acceptable alternative whereby the trial could continue the following day without Jackson. On April 17 the court tried to find alternative counsel

9. Jones states to the court on April 17:
Your Honor, I was embarassed about what happened yesterday. My attorney, Mr. Jackson, did not confer with me on the motion he made about this holiday. I had no idea what he was doing. I am real anxious to get this over with and go on to trial. I don't know too much about the law

at considerable public expense--in addition to the fact that the trial judge was both inconvenienced and had his authority undermined by appellant's refusal to follow a direct court order. Like Wilson, this case involved an ongoing trial, and Jackson's behavior caused the trial to come to a halt.[10] Jackson's "refusals were contemptuous of judicial authority because they were intentional obstructions of court proceedings that literally disrupted

(footnote 9. cont'd)

> but realize my life's at stake and I'm worried and I'm scared.
>
> Yesterday you recommended I speak to a few attorneys about representation so I have spoken to several. I don't have enough money, I can't afford to get another one and at that late hour, most didn't want to get involved. I need another attorney. I'd like to get another attorney. I am in your hands, Your Honor.

10. Appellant stated that his client's rights could not be adequately protected in his

the progress of the trial and hence the orderly administration of justice." Wilson, 421 U.S. at 315-16, 95 S.Ct. at 1806-07 (footnote and citation ommitted). As in Wilson, time was "of the essence" given the ongoing nature of the proceedings. Id at 319, 95 S.Ct. at 1808. The Wilson Court noted the severity of this king of disturbance.

(footnote 10. cont'd)

> absence, thus he has admitted that his presence was necessary for the continuation of the trial. The trial proceeded once substitute counsel was appointed to represent Jones. Although the effectiveness of the substitute counsel is not at issue, we note that Jones, apparently a minor defendant in the trial, was the only defendant not convicted, but instead released because of jury's inability to reach a verdict on his innocense or guilt. Appellants Br. at 18, n. 5.

> Trial courts . . . cannot be expected to dart from case to case on their calendars any time a witness who has been granted immunity decides not to answer questions. In a trial, the court, the parties, witnesses, and jurors are assembled in the expectation that it will proceed as scheduled. Here the District Judge pointed out this problem when defense counsel asked for a continuance; he said: "I think we cannot delay this trial. I cannot delay it. I have many other matters that are equally important to the people concerned in those cases which are following."

Id. at 318-19, 95 S.Ct. at 1807-08. We see no reason to treat an attorney who fails to appear to ask questions more leniently than a witness who refuses to answer questions. Moreover, the case before us presents an even more compeling factual scenario than Wilson because of the number of people involved and the inevitable problems that would arise from an attempt to

reschedule or even delay this trial.

(3) The court below found that appellant' two statements on April 16 that he would not follow the court's order constituted contempt- uous conduct and that this contempt "continued" when appellant argues that his failure to appea cannot be punished summarily because it did not occur "in the actual presence of the court." Fed. R. Crim. P. 42(a). We agree with appellant that the failure to appear ordinarily does not subject one to summary contempt. See, e.g., United States v. Onu, 730 F.2d 253 (5th Cir.), cer. denied, ---U.S.---, 105 S.Ct. 182, 83 L.Ed 2d 116 (1984); Thyssen, Inc. v. S/S Chuen On, 693 F.2d 1171 (5th Cir. 1982); In re Allis, 531 F.2d 1391 (9th Cir.), cert. denied, 429 U.S. 900, 97 S.Ct. 267, 50 L.Ed.2d 185 (1976): Unite States v. Delahanty, 488 F.2d 396 (6th Cir. 1973 But see In re Gates, 478 F.2d 998 (D.C. Cir. 1973 In re Niblack. 476 F.2d 930 (D.C. Cir.). cert. denied. 414 U.S. 909. 94 S.CT. 229. 38 L.Ed.2d 147 (1973). As explained in Thyssen, the essen tial reason for not summarily punishing a

failure to appear "is that although the facts of the absence and the scheduling of the hearing are within the knowledge and presence of the court, nevertheless, '(A)bsence, (tardiness) alone is not contempt. The reasons for the default are important.'" 693 F.2d at 1174-75 (citing In re Allis, 531 F.2d at 1392). The protection of Ruse 42(b) is usually necessary because the judge normally does not know why the alleged contemnor did not appear. Id. at 1175; see also In re Oliver, 92 L.Ed. 682 knowledge of essential elements, due process requires notice and a fair hearing); Delahanty, 488 F.2d at 398 ("While the absence of Appellants was abvious to the Court, the reasons for their absence were not."). In the present case, however, there was no such need to inform the court of the reason for Jackson's absence, as Jackson had already told the court why he would not be present on April 17, and that he was refusing to obey a court order. See Thyssen, 693 F.2d at 1175 (it is possible that where counsel has advised the court that he will

not appear for a certain reason, the procedures of Rule 42(b) need not be followed); In re Niblack, 476 F.2d at 931-33 (lawyer who was nearly two hours late subject to summary contempt where he had been warned by the court numerous times about being on time.[11] Thus,

11. We note that Jackson was given a subsequent opportunity to explain why he was not present. At this hearing, which took place on April 19, the court, in effect, reopened the contempt charge. Had Jackson's absence been for a reason other than that announced on April 16, undoubtedly the court would have modified its judgment accordingly. As the Supreme Court stated in reference to a similar situation: "Although he imposed sentence before hearing the contemnors, the trial judge would, no doubt have modified his action had their statements proved persuasive. Modification of contempt penalties is common where the contemnor apologizes or presents matter in

the circumstances in this case render Rule 42(a) an appropriate method of punishing appellant's subsequent failure to appear. We stress, however, that this is a narrow ruling dependent upon the appellant's prior refusal to obey the court's order and his explanation of why he would not appear. Mere failure to appear, without prior explanation, should not be punished summarily.

(4) Appellant next contends that his statements on April 16 the court merely threatened to find him in contempt if he failed to appear the next day. We disagree with appellant's analysis. Appellant's statements that he would not follow the court's order were contemptuous acts. The Supreme Court's words in Wilson are applicable here:

(footnote 11. con't)

> mitigation." Groppi v. Leslie, 404 U.S. 496, 506 n. 11, 92 S.Ct. 582, 588 N. 11, 30 L.Ed.2d 632 (1972) (in reference to Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed 717 (1952) (citation ommitted).

> The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify. In re Chiles, 22 Wall. 157, 168, 22 L. Ed 819 (1985). Whether such incentive is necessary in a particular case is a matter the Rule wisely leaves to the discretion of the trial court.

421 U.S. at 316-17, 95 S.Ct. at 1806-07 (footnotes ommitted). This is not a situation where the court waited until after the proceedings were over to find defendant in contempt summarily.[12]

12. The supreme Court has, however, sanctioned summary contempt at the end of the trial under appropriate circumstances. Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed 717 (1952).

See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974) (due process denied where final adjudication of contempt for counsel's actions during trial took place summarily after trial had concluded); Groppi v. Leslie, 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972) (legislative resolution citing petitioner for contempt for conduct on floor of State Assembly, passed two days after allegedly contemptuous acts and without notice or opportunity to answer, violates due process); United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977) (summary contempt inappropriate where not imposed upon witness who refused to answer questions until after closing arguments).

13 Here the court acted upon appellant's April 16 statements the very next day, when the statements were ratified by Jackson's failure to appear, and at a time when the court was still

13. In addition, unlike the situation in Groppi and Brannon, Jackson was given notice that he was subjecting himself to contempt and he had the opportunity to address the court on the matter prior to being held in contempt.

suffering from Jackson's actions because it had not yet found someone to represent Jones. See Wilson, 421 U.S. at 319, 95 S.Ct. at 1808. The court properly acted to vindicate its authority at that time.[14]

14. In Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), cert. denied ---U.S.--- 105 S.Ct. 787, 83 L.Ed.2d 781 (1985) we explained that the Supreme Court, in reviewing cases of summary contempt, "has weighed the specific due process right implicated in the circumstances of the case against the accepted judifications for summary contempt procedures." Id. at 1209. Thus, the Court has been reluctant to deprive the accused of a jury trial and impose contempt summarily when the contempt or contempts were serious and involved a total of more than six months' confinement, and when the judgment and sentencing for the contempt were postponed until after the proceeding. Id. at 1209-11. Here, these factors weigh in favor of upholding the summary contempt. Jackson (cont'd)

(footnote 14. cont'd)

was not imprisoned, and was held in contempt during the course of the trial. In addition, although we find appellant's conduct was actionable under Rule 42(a), we also note that the court allowed appellant a full opportunity to be heard on April 19. See note 11, supra. Contrary to appellant's assertion, this hearing was not violative of due process merely because the two rabbis were not permitted to testify, as the court accepted Jackson's claim that religious law forbade work on the days in question. Thus, except for the fact that this hearing was held after Jackson was held in contempt, it complied with the requirements of (Rule 42(b). See Onu, 730 F.2d at 256-57 (Rule 42(b) does not require regorous and formalistic application; absent prejudice or unfairness, failure to follow Rule 42(b) will not result in reversal of contempt judgment); see also Wolfe v. Colement, 681

(cont'd)

(5) Finally, appellant argues that a hearing was necessary prior to his being held in contempt in order to provide him with an opportunity to show the religious importance of his absence. Such a showing was irrelevant, however, given the fact that the court accepted appellant's allegations of religious law and his sincerity in following his religion. moreover, appellant was not held in contempt because he chose to exercise his religious beliefs; rather, the contemptuous acts flowed from appellant's failure to give the court adequate notice of his inability to appear. Passover is not an unpredictable event: it occurs in the spring of each year. Appellant had a duty to inform the court sufficiently before the trial in order to assert his first amendment rights.[15] If the court, given adequate notice of appellant's religious convictions had, nevertheless, scheduled

(footnote 14. cont'd)

F.2d 1302, 1307-08 (11th Cir. 1982); In re Allis, 531 F.2d at 1393.

trial for the first and last two days of Passover, we would be faced with a first amendment question. In the present case, we are not.[16] This situation is similar to one that recently confronted the Fifth Circuit when a state legislator, who was acting as defence counsel in a criminal trial, did not appear for trial because

15 We need not determine the exact contours of what would constitute sufficient notice. Suffice it to say that four days oral notice and a motion filed on the first day of trial were not sufficient in view of the court's specific questions more than two and a half months earlier regarding the days counsel would be available for trial.

16. We note that there is every indication that the trial judge would have accommodated Jackson's religious needs had he been given proper notice. In addition, the court made every effort, short of halting the trial, to accommodate Jackson despite the inadequate notice.

he was attending a legislative session. United States v. Onu, 730 F.2d 253 (5th Cir.), cert. denied, ---U.S.---, 105 S.Ct.183, 83 L.Ed.2d 116 (1984). The Fifth Circuit found that the importance of appellant attending the legislative session was irrelevant. The court stated:

> Requiring a lawyer to adhere to the proper orders of a federal court does not threaten legislative integrity. Senator Washington was not called suddenly to his legislative duties, the federal case was not precipitatively assigned for trial. From the time he sought to enter an appearance in the case, in March, Washington knew or should have known of the trial date and of the scheduled, regular legislative session. He had ample time to communicate with the court in person and to seek an alternative trial date.

Id. at 257. Cr. United States v. Lespier, 558, F.2d 624, 627-28 (1st Cir. 1977) (lawyer's failure to appear because he was at a political

conference, without taking "the smallest step of giving notice earlier," would have been "clearly punishable as criminal contempt"). Likewise, Jackson had more than ample opportunity to give the court notice of his religious needs.

III. INTENT

(6) Jackson argues that he lacked the requisite intent for criminal contempt because his actions were "premised upon" his religious beliefs. We disagree. "Criminal contempt is established when it is shown that the defendant is aware of a clear and definite court order and willfully disobeys the order." United States v. Rylander, 714 F.2d 996, 1001-02 (9th Cir. 1983), cert. denied, ---U.S.---, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984). As stated in Sykes v. United States, 444 F.2d 928 (D.C.Cir. 1971) (distinguishing knowing failure to appear from lapse of memory or confusion as to trial date), "An essential element of (criminal contempt) is an intent, either specific or general, to

commit it. By definition, contempt is a "willful disregard or disobediende of a public authority.'" Id. at 930. In criminal contempt, willfulness "means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 782 (9th Cir.1983).

(7) In the present case, Jackson knew that his motion to stay the proceedings had been denied and that he had been told he must appear on April 17. The court twice warned him that if he failed to appear he would be subject to contempt. Jackson knew that he was telling the court that he would not obey its order on April 16, and he knew he was disobeying the court on April 17. Jackson¶s motive for disobeying the court is irrelevant as far as a finding of intent is concerned, rather it is the knowing failure to obey the court that forms the requisite intent.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1194

In the Supreme Court of the United States

OCTOBER TERM, 1985

STEVEN F. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court imposed an unconstitutional burden on an attorney's First Amendment right to the free exercise of religion by holding him in contempt for failure to appear at scheduled dates of trial after it denied his motion, made on the first day of trial, to adjourn the trial for four full days to allow for his observance of Passover.

2. Whether, in the circumstances of this case, the district court's finding of summary contempt under Fed. R. Crim. P. 42(a) denied petitioner his due process right to notice and an opportunity for a hearing.

3. Whether the evidence of criminal intent was sufficient.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-59a) is reported at 770 F.2d 1550. The opinion of the district court (Pet. App. 1a-25a) is reported at 592 F. Supp. 149.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1985. The petition for a writ of certiorari was filed on November 18, 1985, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an attorney, was found guilty of criminal contempt by the United States District Court for the Southern District of Florida after he stated that he would not obey a court order and then failed to appear to represent his client. Petitioner was fined $1,000. The court of appeals affirmed (Pet. App. 25a-59a).

1. The facts, which are not in dispute, are summarized in the opinions of the court of appeals and the district court. Petitioner was the attorney for one of nine co-defendants in a federal criminal prosecution based on a 35-count indictment. On February 27, 1984, when the district court held a calendar call to set the trial date, the parties estimated that the trial would last approximately three to four weeks. The court asked the attorneys whether any of them had any conflicts in their schedules or preplanned vacations during the months of April and May. Petitioner responded that he did not have a vacation planned, but that he did have a trial scheduled for the first week in April. Petitioner further stated that he had no objection to any other time during April and May. The trial then was set to begin on Monday, April 16. Pet. App. 5a-6a, 29a-30a.

On Thursday, April 12, petitioner's brother, Jeffrey Jackson, appeared at a pretrial hearing in place of petitioner. Jeffrey Jackson informed the court that petitioner was ready for trial but would be unavailable on Tuesday and Wednesday of the next week (April 17 and 18) and Monday and Tuesday of the following week (April 23 and 24) because of his observance of Passover. The judge responded that he had never had a request for whole days off for Passover, but that he always recessed the court sufficiently

early in the day to accommodate those intending to celebrate Passover. Pet. App. 7a, 30a.

On Monday, April 16, the day on which the trial was scheduled to begin, petitioner for the first time filed a written motion requesting that proceedings be stayed on the next two days and on Monday and Tuesday of the following week. Petitioner based his motion on the First Amendment, explaining that he is an observant Jew, that the first and last two days of Passover are important Jewish holy days, and that it had always been his custom to follow the Jewish law that no work could be done on those days. The court denied the motion, stating that a nine-defendant trial that was expected to last between three and four weeks could not be rescheduled at that late date. Petitioner then informed the court that he would not be present on the four days in question. Pet. App. 8a-10a, 31a-32a.

Throughout the rest of that day, the court explored alternative ways of resolving the problem, such as substituting another lawyer for petitioner on the days involved or having a transcript of the missed testimony provided for petitioner. However, these suggestions were unacceptable to petitioner's client, and the court's offer to recess anytime during the day for religious services was rejected by petitioner, who insisted that he could not work at all on the days in question. The court specifically ordered petitioner to be present in court on the following day or be subject to contempt and criminal sanctions. When the court adjourned on Monday, April 16 at 4:00 p.m., it again urged petitioner to be present the following day or be in defiance of a court order. Petitioner informed the court that he would not be present. Petitioner did not appear the following day or on the other three

days in question, but the court was able to obtain the services of a local attorney, Jeffrey Miller, to represent petitioner's client, Jones. Pet. App. 10a-11a, 13a, 32a-34a.*

When petitioner did not appear on Tuesday, April 17, the court found that he had committed contempt twice on the previous day by stating that he would not obey the court's order to appear. The court issued a certificate of contempt, which stated that the issue presented concerned not petitioner's right to practice his religion, but the duty of an attorney to advise the court of scheduling conflicts well in advance. In this case, the court emphasized, petitioner had actually assured the court when the trial date was set that he had no vacation plans or conflicting obligations. The court then set a hearing on the matter for April 19. Pet. App. 20a, 34a-35a.

At the hearing, petitioner, through counsel, argued that he had not been afforded an opportunity to be heard pursuant to Fed. R. Crim. P. 42(b), and that he lacked the requisite intent to support a finding

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* When Jackson did not appear on Tuesday, April 17, defendant Jones stated to the court (Pet. App. 43a-44a n.9):

> Your Honor, I was embarrassed about what happened yesterday. My attorney, Mr. Jackson, did not confer with me on the motion he made about this holiday. I had no idea what he was doing. I am real anxious to get this over with and go on to trial. I don't know too much about the law but realize my life's at stake and I'm worried and I'm scared.
>
> Yesterday you recommended I speak to a few attorneys about representation so I have spoken to several. I don't have enough money, I can't afford to get another one and at that late hour, most didn't want to get involved. I need another attorney. I'd like to get another attorney. I am in your hands, Your Honor.

of criminal contempt. *Petitioner's attorney proffered* evidence of the importance of the days in question to observant Jews. However, the court declined to receive the testimony of two rabbis on this question, explaining that the evidence was irrelevant because the court did not question the sincerity of petitioner's religious beliefs. Petitioner then testified, admitting that Passover occurred every year in March or April and that he had perhaps been tardy in informing the court of his need to be absent. But petitioner stated that he had never before been denied a request for a continuance for religious holidays. The court stated that it would have been a simple matter to rearrange its calender if petitioner had filed his motion when he should have, but that his failure to do so was an irresponsible omission as a lawyer. The court then fined petitioner $1,000. Pet. App. 35a-37a.

2. The court of appeals affirmed (Pet. App. 25a-59a). It concluded that in the circumstances of this case, summary contempt was appropriate because the reasons for petitioner's absence had already been thoroughly explained to the court, making it unnecessary to provide another opportunity for petitioner to explain why he had not been present (*id.* at 47a-49a). The court further found that petitioner's absence created a significant disturbance and delay in the trial proceedings, causing considerable inconvenience to the jurors, defendants, and other attorneys, as well as expense to the public. In the court of appeals' view, these consequences warranted summary contempt. *Id.* at 42a-47a. The court of appeals also agreed with the district court that evidence of the religious importance of petitioner's absence was irrelevant, because the finding of contempt did not stem from petitioner's exercise of his religious beliefs but

rather from his failure to give the district court adequate notice of his inability to appear. In the court of appeals' view, petitioner had a duty to inform the court sufficiently before trial in order to assert his First Amendment rights. *Id.* at 55a. Because there was no indication that the district court would have refused to accommodate a timely request by petitioner for a continuance based on religious grounds, the court of appeals found no First Amendment violation (*id.* at 55a-58a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 10-24) that the district court's order holding him in contempt for failing to appear imposed an unconstitutional burden on his First Amendment right to the free exercise of his religion. Unlike the cases cited by petitioner (Pet. 12-18), however, this case does not present a situation in which the government imposed a restriction that directly affected a person's religious practices. Compare *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986). To the contrary, the district court explained to petitioner that it would have been quite willing to adjust its schedule to allow for his observance of Passover (Pet. App. 36a-37a). Indeed, the record establishes that the court was prepared to adjust the trial schedule for *any* planned vacations or other commitments, and the court intended, as was its custom, to adjourn for the observance of Passover (*id.* at 6a-8a). Yet when the trial date was set, petitioner specifically informed the court that he had no

objection to scheduling the trial during April or May (*id.* at 5a-6a, 29a-30a).

Petitioner was held in contempt not because of his religious observance, but because he had failed to notify the court until immediately before the trial that he would not be present for four of the first seven days of the trial. Petitioner's unavailability was not due to circumstances unanticipated by him; he informed the district court that it had been his practice since childhood to follow Jewish law that no work may be done on those days (Pet. App. 31a). The district judge remarked that he had never had a request to adjourn for four full days at Passover, and he understandably was taken by surprise by petitioner's motion to this effect, filed only as the trial was beginning (*id.* at 7a, 9a, 20a, 36a-37a). At that point it was impossible to accommodate petitioner without seriously disrupting a trial that involved numerous other parties. In fact, petitioner concedes in this Court that his request for a stay of proceedings "was made late in the day" (Pet. 20); that he "certainly recognized that his request might cause some inconvenience" (*ibid.*); and that "[i]t is certainly true that had [he] given more notice to the judge it is possible that there would have been an accom[m]odation" (Pet. 21).

Thus, in the circumstances of this case, it was petitioner's own neglect of his responsibilities as an officer of the court and attorney for his client, not the court's action, that was the cause of the conflict between petitioner's religious obligations and the government's need to proceed with its carefully scheduled functions. Compare *Thomas* v. *Review Board*, 450 U.S. 707 (1981). Petitioner properly may be held responsible for the consequences of that conduct.

The courts below therefore correctly held that this case does not present a question of the refusal by the government to accommodate a person's First Amendment right to the free exercise of religion, because petitioner failed to afford the court a genuine opportunity to accommodate that right (Pet. App. 20a, 55a-58a). Cf. *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); *United States* v. *Onu*, 730 F.2d 253 (5th Cir. 1984), cert. denied, No. 84-124 (Oct. 1, 1984). Moreover, by the time petitioner *did* request a stay, the governmental interest in avoiding disruption of the efficient administration of justice had plainly taken on sufficient importance to justify the indirect impact on petitioner's First Amendment right occasioned by the contempt sanction. See *Thomas* v. *Review Board*, 450 U.S. at 718-719.

2. Petitioner further maintains (Pet. 25-29) that the district court's finding of summary contempt, without a prior hearing, deprived him of an opportunity to be heard. This claim is without merit.

The court of appeals correctly found this case to be similar to *United States* v. *Wilson*, 421 U.S. 309 (1975), in which summary contempt under Fed. R. Crim. P. 42(a) was held to be appropriate for the refusal of a witness to testify at trial despite a grant of immunity. Just as in *Wilson*, this case involved an ongoing trial that was brought to a halt by the conduct in question. Indeed, as the court of appeals observed, the disruption of the proceedings in this case was even more serious than in *Wilson* because of the number of people affected and the inevitable complications involved in any attempt to delay or reschedule the trial (Pet. App. 44a-47a).

The court of appeals recognized that a failure to appear is not normally punishable by summary con-

tempt. This is because a prior hearing is usually necessary for the court to learn the reasons for the person's conduct (Pet. App. 48a). In this case, petitioner already had fully explained his reasons for not being present and stated his clear intention not to obey the court's order to appear. Furthermore, a hearing subsequently was held, and petitioner was given an opportunity at that hearing to explain his absence by offering "any exculpatory, mitigating or extenuating reasons" (*id.* at 20a). As the court of appeals observed, the district court obviously had reserved the possibility of modifying its action (*id.* at 49a n.11). See *Groppi* v. *Leslie*, 404 U.S. 496, 506 n.11 (1972). In these circumstances, the court of appeals correctly held that the finding of summary contempt satisfied the requirements of due process.

3. Finally, petitioner contends (Pet. 30-33) that there was no evidence of criminal intent because, in his view, the mere refusal to obey a court order, without evidence of a bad motive, is insufficient to prove contempt. This argument is insubstantial. As the court of appeals held, the essential elements of criminal contempt are knowledge of the order and a willful disobedience of it. *Falstaff Brewing Corp.* v. *Miller Brewing Co.*, 702 F.2d 770, 782 (9th Cir. 1983); *United States* v. *Rylander*, 714 F.2d 996, 1001-1002 (9th Cir. 1983), cert. denied, No. 83-906 (May 21, 1984). Willfulness in this context means simply an intentional or deliberate violation, as distinguished from accidental or negligent conduct. *Falstaff Brewing Corp.* v. *Miller Brewing Co.*, *supra*. Petitioner concedes that "without question the subject order was clear and definite and was understood by the Petitioner" (Pet. 19). Nothing more is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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